1988

Billie Buymon Newsom, Richard McKean Newsom, Stacy Newsom Klien, Teddy Maurine Newsom, Ted Newsom v. Gold Cross Service Inc., Gold Cross Ambulance, and Gold Cross Ambulance Service: Brief of Appellant

Utah Court of Appeals

Nelson L. Hayes, Lloyd A. Hardcastle; Richards, Brandt, Miller and Nelson; attorneys for respondents.
James W. McConkie, Randall Bunnell; attorneys for appellants.

IN THE UTAH COURT OF APPEALS

BILLIE BUYMON NEWSOM, RICHARD McKEAN NEWSOM, STACY NEWSOM KLIEN, TEDDY MAURINE NEWSOM, and ROBERT NEWSOM, as heirs of the estate of TED NEWSOM, deceased, Plaintiffs and Appellants,	:	BRIEF OF THE APPELLANTS
v.	:	Court of Appeals No. 880051-CA
GOLD CROSS SERVICE, INC., dba GOLD CROSS AMBULANCE and GOLD CROSS AMBULANCE SERVICE, Defendants and Respondents.	:	Argument Priority Classification: 14b

Appeal from a final order of Judge John Rokich, Third Judicial District Court, Salt Lake County, after trial by jury of a wrongful death action.

Nelson L. Hayes
Lloyd A. Hardcastle
Attorneys for Respondents
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
(801) 531-1777

James W. McConkie
Randall Bunnell
Attorneys for Appellants
PARKER, McKEOWN & McCONKIE
505 East 200 South, Suite 300
Salt Lake City, Utah 84102
(801) 363-5511

IN THE UTAH COURT OF APPEALS

BILLIE BUYMON NEWSOM, RICHARD McKEAN NEWSOM, STACY NEWSOM KLIEN, TEDDY MAURINE NEWSOM, and ROBERT NEWSOM, as heirs of the estate of TED NEWSOM, deceased, Plaintiffs and Appellants,	:	BRIEF OF THE APPELLANTS
v.	:	Court of Appeals No. 880051-CA
GOLD CROSS SERVICE, INC., dba GOLD CROSS AMBULANCE and GOLD CROSS AMBULANCE SERVICE, Defendants and Respondents.	:	Argument Priority Classification: 14b

Appeal from a final order of Judge John Rokich, Third Judicial District Court, Salt Lake County, after trial by jury of a wrongful death action.

Nelson L. Hayes
Lloyd A. Hardcastle
Attorneys for Respondents
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110
(801) 531-1777

James W. McConkie
Randall Bunnell
Attorneys for Appellants
PARKER, McKEOWN & McCONKIE
505 East 200 South, Suite 300
Salt Lake City, Utah 84102
(801) 363-5511

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT SHOWING JURISDICTION OF COURT OF APPEALS

This appeal was originally taken to the Supreme Court of Utah pursuant to the authority granted in Rule 3(a) of the Utah Rules of Civil Procedure for review of a judgment entered against the Appellants after trial by jury. Subsequently, the Supreme Court of Utah poured-over this case to the Court of Appeals for disposition.

STATEMENT SHOWING NATURE OF THE PROCEEDINGS

This appeal is from a judgment entered against the Appellants by the Third Judicial District Court after trial by jury of their wrongful death action.

STATEMENT OF THE ISSUES

The only issue on appeal is whether the trial court committed reversible error by giving jury instruction No. 20 (addendum p. 17).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

None

STATEMENT OF THE CASE

I.

NATURE OF THE CASE

The Appellants, heirs of decedent Ted Newsom, brought a wrongful death cause of action against the Respondent, Gold Cross Service, Inc., a business in Salt Lake County which operates an ambulance service. The Appellants alleged that Gold Cross Ambulance and its employees were negligent in failing to dispatch in a timely manner an ambulance which had been requested after Ted Newsom became ill and subsequently died shortly thereafter. The Appellants alleged that had the ambulance arrived in a timely manner, Ted Newsom would have had some chance of survival. (R.239-244)

II.

COURSE OF PROCEEDINGS

The trial of the case commenced on September 8, 1987 and lasted until September 14, 1987. The Honorable John Rokich, District Judge, submitted his instructions to the jury, including instruction No. 20 (R.498). The Appellants made an exception to Jury Instruction No. 20 (T. 159). The jury returned a special verdict finding that the Respondent, Gold Cross Services, was negligent as alleged by the Appellants. The jury further found that the negligence on the part of the Respondent was not a proximate cause of the death of Ted Newsom (R.597-598).

III.

DISPOSITION AT TRIAL COURT

Judge Rokich entered judgment on the verdict on November 9, 1987 ordering that the Appellants be awarded no money damages and that the action be dismissed on the merits. (R.627-628)

IV.

RELEVANT FACTS

On May 3, 1984, Ted Newsom was at the Sugar Street Cafe in Midvale, Utah and fell after becoming ill. Immediately thereafter, a call from the Sugar Street Cafe was made to 911 Emergency Services. The 911 Emergency Services transferred the call to the Salt Lake City 911 fire department dispatcher. At 4:00 p.m. on the same date, the fire dispatcher contacted the Gold

Cross ambulance dispatcher (R.126). Between 4:00 p.m. and 4:05 p.m., the Gold Cross dispatcher paged its nearest ambulance to the Sugar Street Cafe four different times. The Gold Cross dispatcher stated that the nearest Gold Cross Ambulance was not answering the page (R.128). At 4:05 p.m., the Gold Cross dispatcher dispatched a second ambulance to the Sugar Street Cafe. Upon dispatching the second ambulance, the Gold Cross ambulance dispatcher discontinued trying to contact the nearest ambulance. At 4:10 p.m., the Midvale police dispatcher cancelled the Gold Cross ambulance because a Midvale ambulance was en-route (R.129). Between 4:17 p.m. and 6:18 p.m., the Midvale ambulance arrived at the Sugar Street Cafe. At 4:39 p.m., the Midvale ambulance transported the deceased to Cottonwood Hospital (R.130). Had the Gold Cross dispatcher been able to contact the nearest Gold Cross ambulance promptly, the ambulance could have arrived at the Sugar Street Cafe within approximately three minutes without lights and sirens. It would have taken the Gold Cross ambulance approximately five to six minutes to travel from the Sugar Street Cafe to Cottonwood Hospital (R.137).

At trial, the Appellants called Dr. Frank Yanowitz, M.D., cardiologist, to testify on their behalf. Dr. Yanowitz was presented with a hypothetical question which assumed facts substantiated by evidence presented by the Appellants at trial (T.9-13). Based upon the hypothetical, Dr. Yanowitz concluded

that had the Gold Cross Ambulance arrived at the Sugar Street Cafe prior to 4:13 p.m., with appropriate medical equipment, Mr. Newsom would have had at least a 70% to 80% chance of survival (T.12-13). On cross examination, the Respondent presented Dr. Yanowitz with an alternative hypothetical based upon evidence presented by the Respondent during trial. Dr. Yanowitz gave his opinion that given the facts as presented by the Respondent, Mr. Ted Newsom would have had less than a 50% chance of survival. (T.36-38)

The Respondents called Dr. John Parry, M.D., a cardiologist who testified that in a hospital where there are infinite resources and the best of everything, the prognosis would have been poor for Ted Newsom and that he probably had less than a 5% chance of survival, (T.54-56). On cross examination, Dr. Parry was asked to assume the Appellant's version of the facts and Dr. Parry admitted that certain medical equipment on board of the Gold Cross ambulance would have been medically helpful in respect to Ted Newsom's condition (T.72). The Respondents also called Dr. Jeff Clausen, M.D., a specialist in emergency medicine, who testified on direct examination that even if Ted Newsom would have received appropriate medical care, his chances of survival would have been minimal (T.131). Dr. Clausen testified that Ted Newsom had a 9% probability of survival (T.135-136).

The trial court's jury instruction No. 20, with which the

Appellants took an exception, states as follows:

> The plaintiffs are not entitled to recover against the defendants merely by showing, by a preponderance of the evidence, that such defendants failed to conform to the standard of care elsewhere defined in these instructions. The plaintiffs must also prove, by a preponderance of expert medical testimony, that the death of Ted Newsom, of which the plaintiffs complain, probably would not have occurred if such defendant had conformed to the standard of care. In this connection, it is not enough for the plaintiffs to have shown that the result might have been different, or that there is a possibility that the result would have been different, had the defendant conformed to the standard of care.
>
> In other words, unless the plaintiffs have proven, by a preponderance of the expert medical testimony, that the result probably would have been different if the defendant had conformed to the standard of care, as defined in these instructions, then the plaintiffs have not proved that any injury or loss sustained by them was proximately caused the conduct of the defendant. (R.498, Addendum p. 17)

SUMMARY OF THE ARGUMENT

The erroneous instruction precluded the jury from awarding damages upon a finding of a lost chance of survival of less than 50%. Some jurisdictions accept the rule as enunciated in the erroneous instruction, whereas other jurisdictions have accepted variations of an alternative rule that full recovery can be made even if the possibility of survival is less than 50%. The better reasoned view, accepted by the Supreme Court of Utah, is that recovery can be made even where the lost chance is less than 50%, and that it is the prerogative of the jury to place a value on the lost chance.

DETAIL OF THE ARGUMENT

The issue in this case is whether a wrongful death recovery for damages can be made where negligence on the part of the defendant has resulted in a loss of chance of survival of less than 50% on the part of the decedent.

The jurisdictions considering this issue have taken three different approaches. The first approach is the same approach used by the trial court in the instant case. Where medical malpractice has resulted in a loss of chance of survival, the defendant has the burden of proving that had proper treatment been rendered, the decedent probably would have survived. In other words, probability is defined as that which is more likely than not or greater than 50%. Cooper v. Sisters of Charity of Cinncinati, 27 Ohio St.2d 242, 272 N.E.2d 97 (1971). In this approach, a mere loss of an unspecified increment of the chance for survival is insufficient to meet the standard of probability. Hiser v. Randoff, 126 Ariz. 608, 617 P.2d 774 (1980).

In the second approach, the plaintiff does not have the burden of proving that the decedent's chance of survival was more probable than not, or greater than 50%; the plaintiff need only show that there would have been a substantial possibility of survival had the proper medical treatment been rendered. The lost chance cannot be so insubstantial as to amount to sheer speculation, but the chance of survival does not need to have

been 51% or more before it was reduced. Waffen v. U. S. Department of Health and Human Services, 799 F.2d 911 (4th Cir., 1986). In Herskovits v. Group Health Cooperative of Puget Sound, 99 Wash.2d 609, 664 P.2d 474 (1983), the court, taking the above approach, held that recovery could be made where the decedent's chance of survival was reduced from 30% to 25% because of medical malpractice, reasoning as follows:

> To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50% chance of survival, regardless of how flagrant the negligence. (99 Wash.2d 609,611, 664 P.2d 474,477)

In Kallenberg v. Beth Israel Hospital, 45 A.D.2d 177, 357 N.Y.S.2d 508 (1974), aff'd, 37 N.Y.2d 719, 374 N.Y.S.2d 615, 337 N.E.2d 128 (1975), the decedent was denied a 20% to 40% chance of survival because of medical malpractice and the court allowed recovery. In Jeanes v. Miller, 428 F.2d 598 (8th Cir. 1970), the court held that Plaintiff could recover where medical malpractice had lessened the decedents 35% chance of survival.

The third approach, accepted by at least one jurisdiction, allows recovery for loss of chance of survival no matter how small. James v. United States, 483 F. Supp. 581 (N.D. Calif., 1980). In James, the court indicates that existing authority requires, at a minimum, that defendant actually destroy a "substantial possibility of survival," but the facts of the case seem to indicate that the court in practice has allowed a more

relaxed standard. In this case, plaintiffs apparently failed to sustain their burden of proof that a tumor was operable at a given time which was a condition precedent to finding that the decedent had a 10% to 15% chance of surviving five years. However, the court held that plaintiff's failure to establish the premise for the loss of a statistically measurable chance of survival does not prevent recovery. The court concluded that a plaintiff may be compensated for any aggravation of his injury or shortening of his life span proximately caused by the defendant's negligence, even though other factors contributed to or caused the initial condition.

In all three of the above approaches, all provable damages are generally recoverable if the burden of proof has been met by the plaintiff. Thus, in the first approach, if the decedent was denied a 60% chance of survival, the plaintiff would be entitled to receive 100% of his damages. In the second and third approach, if the decedent was denied a 30% chance of recovery, the plaintiff would nevertheless be entitled to 100% of his damages. Professor Joseph H. King, Jr., in his law review article entitled "Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences," 90 Yale L.J., 1353 (1981), has criticized the approaches used by courts in loss of chance cases. He indicates that the better reasoned approach is a follows:

> Causation has for the most part been treated as an all or nothing proposition. Either a loss was caused by the defendant or was not.... (A) plaintiff ordinarily should be required to prove by the applicable standard of proof that the defendant caused the loss in question. What causes a loss, however, should be a separate question from what the nature and extent of the loss are. This distinction seems to have alluded the courts, with the result that lost chances in many respects are compensated either as certainties or not at all.
>
> To illustrate, consider the case in which a doctor negligently fails to diagnose a patient's cancerous condition until is has become inoperable. Assume further that even with a timely diagnosis the patient would have had only a 30% chance of recovering from the disease and surviving over the long term. There are two ways of handing such a case. Under the traditional approach, this loss of a not-better-than-even chance of recovering from the cancer would not be compensable because it did not appear more likely than not that the patient would have survived with proper care. Recoverable damages, if any, would depend on the extent to which it appeared that cancer killed the patient sooner than it would have with timely diagnosis and treatment, and on the extent to which the delay in diagnosis aggravated the patient's condition, such as by causing additional pain. A more rational approach, however, would allow recovery for the loss of the chance of cure even though the chance was not better than even. The probability of long term survival would be reflected in the amount of damages awarded for the loss of the chance. While the plaintiff here could not prove a preponderance of the evidence that he was denied a cure by the defendant's negligence, he could show by a preponderance that he was deprived of a 30% chance of a cure. (90 Yale L.J. at 1363-64)(Emphasis added in article)

Further reasoning by Professor King reveals that the all-or-nothing approach cannot be defended. The first reason is because of the patently arbitrary nature of the approach. It seems arbitrary to deny recovery to a victim denied a 49% chance of

recovery as opposed to a victim denied a 51% chance of recovery. Furthermore, the all-or-nothing approach is obviously at odds with the basic rationale of the tort system which is designed to deter wrongful conduct. The all-or-nothing approach will have no incentive to medical practitioners to render proper care where the chance of survival would be less than 50% in the first place. In addition, the patent injustice of the all-or-nothing approach will create distortions and legal fictions in respect to rules surrounding causation and damages. (Yale L.J. at 1376-78)

The court in Waffen, supra, obviously approved of much of Professor King's approach. The court, citing with obvious approval the language used in Professor King's illustration, states as follows:

> ...In analyzing problems of this nature, it is better to consider the loss of a substantial chance of survival as a different type of loss with a different measure of damages than the loss of life, instead of treating the former as a variation on the burden of proving causation in a claim for negligently causing the patient's death. The destroyed chance itself is the compensable loss. (799 F.2d 911,919)

Unfortunately, the court was not able to accept completely the more rational approach and continued to insist upon a "substantial possibility" standard. Even a "substantial possibility" standard would be at odds with Professor King's more rational approach and would be subject to the same criticisms of arbitrariness and possible distortion of the tort system.

The Supreme Court of Utah has already adopted the better

reasoned approach as early as 1970 in a factual context which is not substantially different than the factual context of the instant case. In Brown v. Johnson, 24 Utah 2d 388, 472 P.2d 942 (1970), the plaintiff was involved in an automobile accident and sustained bodily injury. At trial, a doctor testified that the plaintiff had a 15% chance of requiring surgery in the future. The defendants assigned error to the trial court for refusing to instruct the jury that nothing could be awarded for possible surgery. The defendants apparently thought that unless the plaintiff had over a 50% chance of having surgery, no award could be made. The court rejected the defendant's argument and stated as follows:

> In order to recover damages for any injury or harm, the plaintiff must convince the jury by a preponderance of the evidence that the injury has been or will be sustained. This does not mean that the chances of sustaining the harm must be over 50%. It means that the jury must be convinced by a preponderance of the evidence that there is a definite risk of harm, and when so convinced, the jury will evaluate the risk.
>
> Here the preponderance of the evidence was to the effect that 15 out of each 100 people in the condition of the plaintiff would positively require future surgery. There is nothing speculative about it. The percentage is certain. The value to placed upon the percentage is for the jury to determine. If the law were as Defendant hoped it is and there were 100 cases like the instant one, the jury would know that 15 of the plaintiffs would surely require the surgery and be entitled to recover therefore, yet none of them could recover because no one plaintiff could convince the jury that he himself had more than a 50% chance of requiring the surgery. This reasoning would give an undeserved advantage to the wrongdoing defendant. (24 Utah 2d 388,392, 472 P.2d 942,945)

In light of Brown, it is apparent that the Supreme Court of Utah has long ago adopted the better reasoned approach. The Supreme Court has been able to make the critical distinction referred to by Professor King which has alluded other courts. The Supreme Court has separated the question of causation of a loss from the nature and extent of the loss. Although the factual context involves a percentage possibility of future surgery, the principles enunciated therein are equally applicable to the factual context involved where a chance of survival by the decedent has been lost because of medical malpractice. In Brown, the plaintiff had a small chance of requiring future surgery and this injury was compensable, with the jury to determine the value to be placed upon the chance of future surgery. In a case involving a small loss of chance of survival because of negligence, the Supreme Court would undoubtedly allow recovery for the loss of chance, with the jury to determine the value of the lost chance. These two factual contexts are nothing more than two sides of the same coin.

CONCLUSION AND RELIEF SOUGHT

In light of Brown, the trial court's jury instruction No. 20 in the instant case was contrary to Utah Law. There was evidence presented at trial upon which the jury could have found that Ted Newsom had less than a 50% chance of survival which was removed because of Respondent's negligence. However, jury instruction

No. 20 precluded the jury from awarding appropriate damages.

The Appellants respectfully request the Court of Appeals to reverse the Order of the District Court and remand for a new trial on the issue of proximate cause and damages.

Respectfully submitted this 15 day of June, 1988.

James W. McConkie

Randall Bunnell

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was either hand-delivered or mailed by United States mail, postage prepaid, this 15 day of June, 1988, to the following:

Nelson L. Hayes
Lloyd A. Hardcastle
RICHARDS, BRANDT, MILLER & NELSON
CSB Tower, Suite 700
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110

MISC/srm
NEWSOM.BRF

INSTRUCTION NO. 10

The plaintiffs are not entitled to recover against the defendants merely by showing, by a preponderance of the evidence, that such defendant failed to conform to the standard of care elsewhere defined in these instructions. The plaintiffs must also prove, by a preponderance of expert medical testimony, that the death of Ted Newsom, of which the plaintiffs complain, probably would not have occurred if such defendant had conformed to the standard of care. In this connection, it is not enough for the plaintiffs to have shown that the result might have been different, or that there is a possibility that the result would have been different, had the defendant conformed to the standard of care.

In other words, unless the plaintiffs have proved, by a preponderance of the expert medical testimony, that the result probably would have been different if the defendant had conformed to the standard of care, as defined in these instructions, then the plaintiffs have not proved that any injury or loss sustained by them was proximately caused the conduct of the defendant.